

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN A. HENRY, J-95418,)	
)	
Plaintiff(s),)	No. C 13-0201 CRB (PR)
)	
v.)	ORDER OF SERVICE
)	
PRISON MEDICAL PROVIDERS, et al.,)	(Docket # 4)
)	
Defendant(s).)	

Plaintiff, a prisoner at Centinela State Prison (CSP), has filed a pro se complaint under 42 U.S.C. § 1983 alleging that, while he was at Salinas Valley State Prison (SVSP), Prison Medical Providers (PMP) doctors M. Sepulveda and E. Bridgnell denied his primary doctor's referrals to see an ear, nose and throat (ENT) specialist, which ultimately caused him to lose hearing in one of his ears. Plaintiff claims that the defendants' actions (and general policy against referrals) amounted to deliberate indifference to serious medical needs under § 1983 and to state law negligence under 28 U.S.C. § 1367.

Plaintiff also seeks appointment of counsel under 28 U.S.C. § 1915.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable

1 claims or dismiss the complaint, or any portion of the complaint, if the complaint
2 "is frivolous, malicious, or fails to state a claim upon which relief may be
3 granted," or "seeks monetary relief from a defendant who is immune from such
4 relief." Id. § 1915A(b). Pro se pleadings must be liberally construed, however.
5 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
7 essential elements: (1) that a right secured by the Constitution or laws of the
8 United States was violated, and (2) that the alleged violation was committed by a
9 person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48
10 (1988).

11 B. Legal Claims

12 Deliberate indifference to serious medical needs violates the Eighth
13 Amendment's proscription against cruel and unusual punishment. See Estelle v.
14 Gamble, 429 U.S. 97, 104 (1976). Such indifference may appear when prison
15 officials deny, delay or intentionally interfere with medical treatment, or it may
16 be shown in the way in which prison officials provide medical care. See
17 McGuckin v. Smith, 974 F.2d 1050, 1062 (9th Cir. 1992) (delay of seven months
18 in providing medical care during which medical condition was left virtually
19 untreated and plaintiff was forced to endure "unnecessary pain" sufficient to
20 present colorable § 1983 claim), overruled on other grounds, WMX
21 Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

22 Liberally construed, plaintiff's allegations that PMP doctors M. Sepulveda
23 and E. Bridgnell denied his primary doctor's referrals to see an ear, nose and
24 throat (ENT) specialist present an arguably cognizable claim for deliberate
25 indifference to serious medical needs under § 1983 and a state law claim for
26 negligence under § 1367, and will be served on these two defendants. See id.

C. Request for Appointment of Counsel

Plaintiff's motion for appointment of counsel (docket # 4) is DENIED for lack of exceptional circumstances. See Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).

CONCLUSION

For the foregoing reasons and for good cause shown,

1. The clerk shall issue summons and the United States Marshal shall serve, without prepayment of fees, copies of the complaint in this matter, all attachments thereto, and copies of this order on the following defendants at SVSP: PMP doctors M. Sepulveda and E. Bridgnell. All other defendants are dismissed. The clerk also shall serve a copy of this order on plaintiff.

2. In order to expedite the resolution of this case, the court orders as follows:

a. No later than 90 days from the date of this order, defendants shall serve and file a motion for summary judgment or other dispositive motion. A motion for summary judgment must be supported by adequate factual documentation and must conform in all respects to Federal Rule of Civil Procedure 56, and must include as exhibits all records and incident reports stemming from the events at issue. A motion for summary judgment also must be accompanied by a Rand notice so that plaintiff will have fair, timely and adequate notice of what is required of him in order to oppose the motion. Woods v. Carey, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998), must be served concurrently with motion for summary judgment). A motion to dismiss for failure to exhaust available administrative remedies must be accompanied by a similar notice. Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012); Woods, 684 F.3d at 935

1 (notice requirement set out in Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003),
2 must be served concurrently with motion to dismiss for failure to exhaust
3 available administrative remedies).

4 If defendants are of the opinion that this case cannot be resolved by
5 summary judgment or other dispositive motion, they shall so inform the court
6 prior to the date their motion is due. All papers filed with the court shall be
7 served promptly on plaintiff.

8 b. Plaintiff must serve and file an opposition or statement of
9 non-opposition to the dispositive motion not more than 28 days after the motion
10 is served and filed.

11 c. Plaintiff is advised that a motion for summary judgment
12 under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
13 case. Rule 56 tells you what you must do in order to oppose a motion for
14 summary judgment. Generally, summary judgment must be granted when there
15 is no genuine issue of material fact – that is, if there is no real dispute about any
16 fact that would affect the result of your case, the party who asked for summary
17 judgment is entitled to judgment as a matter of law, which will end your case.
18 When a party you are suing makes a motion for summary judgment that is
19 properly supported by declarations (or other sworn testimony), you cannot simply
20 rely on what your complaint says. Instead, you must set out specific facts in
21 declarations, depositions, answers to interrogatories, or authenticated documents,
22 as provided in Rule 56(e), that contradicts the facts shown in the defendant's
23 declarations and documents and show that there is a genuine issue of material
24 fact for trial. If you do not submit your own evidence in opposition, summary
25 judgment, if appropriate, may be entered against you. If summary judgment is
26 granted, your case will be dismissed and there will be no trial. Rand v. Rowland,

1 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App. A).

2 Plaintiff also is advised that a motion to dismiss for failure to exhaust
3 available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted,
4 end your case, albeit without prejudice. You must "develop a record" and present
5 it in your opposition in order to dispute any "factual record" presented by the
6 defendants in their motion to dismiss. Wyatt v. Terhune, 315 F.3d 1108, 1120
7 n.14 (9th Cir. 2003). You have the right to present any evidence to show that you
8 did exhaust your available administrative remedies before coming to federal
9 court. Such evidence may include: (1) declarations, which are statements signed
10 under penalty of perjury by you or others who have personal knowledge of
11 relevant matters; (2) authenticated documents – documents accompanied by a
12 declaration showing where they came from and why they are authentic, or other
13 sworn papers such as answers to interrogatories or depositions; (3) statements in
14 your complaint insofar as they were made under penalty of perjury and they show
15 that you have personal knowledge of the matters state therein. In considering a
16 motion to dismiss for failure to exhaust, the court can decide disputed issues of
17 fact with regard to this portion of the case. Stratton, 697 F.3d at 1008-09.

18 (The Rand and Wyatt/Stratton notices above do not excuse defendants'
19 obligation to serve said notices again concurrently with motions to dismiss for
20 failure to exhaust available administrative remedies and motions for summary
21 judgment. Woods, 684 F.3d at 935.)

22 d. Defendants must serve and file a reply to an opposition not
23 more than 14 days after the opposition is served and filed.

24 e. The motion shall be deemed submitted as of the date the
25 reply is due. No hearing will be held on the motion unless the court so orders at a
26 later date.

1 3. Discovery may be taken in accordance with the Federal Rules of
2 Civil Procedure. No further court order under Federal Rule of Civil Procedure
3 30(a)(2) or Local Rule 16 is required before the parties may conduct discovery.

4 4. All communications by plaintiff with the court must be served on
5 defendants, or defendants' counsel once counsel has been designated, by mailing
6 a true copy of the document to defendants or defendants' counsel.

7 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must
8 keep the court and all parties informed of any change of address and must comply
9 with the court's orders in a timely fashion. Failure to do so may result in the
10 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

11 SO ORDERED.

12 DATED: May 20, 2013



CHARLES R. BREYER
United States District Judge